



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

JUN 24 2009

OFFICE OF  
REGIONAL COUNSEL

*Certified Mail/Return Receipt Requested*

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550 S. Hope Street, Suite 2000  
Los Angeles, CA 90071-2627

James Cagle  
Risk Manager – EHS  
CPO-AGRIUM  
310 Conda Road  
Soda Springs, Idaho 83276

Re: Administrative Consent Order for Nu-West Industries Idaho Facility  
EPA ID Number IDD 000 466 888

Dear Messrs. Burton and Cagle:

Enclosed please find a true and correct copy of the Administrative Order on Consent (Order) executed by Nu-West Industries, Inc. and the U.S. Environmental Protection Agency. The Order was issued pursuant to Section 3013 of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. § 6934. As provided by Paragraph 134 of the Order, the effective date is the date on which Nu-West receives this letter and the enclosed Order.

The Agency does appreciate the cooperation of Nu-West Industries in this matter.

Sincerely,

A handwritten signature, likely of Andrew Boyd, is written in ink. It appears to be a stylized "A" followed by a "B" and a slanted line.

Andrew Boyd  
Associate Regional Counsel

Enclosure

cc: (w/enclosure):

Darrell G. Early, Deputy Attorney General, Office of the Idaho Attorney General  
Brian Monson, Idaho Department of Environmental Quality

**CERTIFICATE OF SERVICE**

IN THE MATTER OF: NU-WEST INDUSTRIES, INC.

DOCKET NO: RCRA -10-2009-0186

I hereby certify that on the date specified below a second original of the foregoing RCRA  
Section 3013 Administrative Order on Consent, EPA Region 10, 1200 Sixth Avenue, Suite 900,  
Seattle WA 98101-3140, was sent by Certified Mail, Return Receipt Requested, postage prepaid to:

P. Scott Burton, Esq.  
Hunton and Williams LLP  
550 S. Hope Street, Suite 2000  
Los Angeles, CA 90071-2627

and a true and correct copy of the same was sent by Certified Mail, Return Receipt Requested,  
postage prepaid to:

James Cagle  
Risk Manager – EHS  
CPO-AGRIUM  
310 Conda Road  
Soda Springs, ID 83276

Dated this 24<sup>th</sup> day of June, 2009

Carol D. Kennedy, RHC, ORC-158  
[Name/Title/office]

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

IN THE MATTER OF:

ADMINISTRATIVE ORDER  
ON CONSENT

Nu-West Industries, Inc.  
d/b/a Agrium Conda Phosphate  
Operations  
3010 Conda Road  
Soda Springs, Idaho 83276

RESPONDENT

EPA ID No. IDD 000 466 888

Docket No: RCRA-10-2009-0186

Proceeding under Section 3013(a) of the  
Resource Conservation and Recovery Act,  
as amended, 42 U.S.C. § 6934(a)

**RCRA SECTION 3013(a) ADMINISTRATIVE ORDER ON CONSENT  
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## **RCRA SECTION 3013(a) ADMINISTRATIVE ORDER ON CONSENT**

### **I. JURISDICTION**

1. This Administrative Order on Consent ("Consent Order" or "Order") is issued pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Agency") by Section 3013(a) of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), as amended, 42 U.S.C. § 6934(a). The authority to enter into this Consent Order has been duly delegated to the Director, Office of Compliance and Enforcement, EPA Region 10.
2. This Consent Order is issued to Nu-West Industries, Inc. d/b/a Agrium Conda Phosphate Operations ("Nu-West" or "Respondent"), a Delaware corporation owned by Agrium U.S., Inc. doing business in the State of Idaho. Without admitting to any Findings of Fact, Conclusions of Law, or Determinations, Respondent consents to and agrees not to contest EPA's authority to issue this Consent Order and to enforce its terms. Further, Respondent will not contest EPA's authority to: compel compliance with this Consent Order in any subsequent enforcement proceedings; require Respondent's full or interim compliance with the terms of this Consent Order; or impose sanctions for non-compliance with the terms of this Consent Order; provided, however, that Respondent retains any and all rights it may have to dispute the merits of any such claims.
3. This Consent Order is based upon the administrative record compiled by EPA and incorporated herein by reference. The record is available for review by Respondent and the public at EPA Region 10's office at 1200 Sixth Avenue, Seattle, WA 98101.
4. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), EPA granted the Idaho Department of Environment Quality ("IDEQ") the authorization to operate a hazardous waste program in lieu of the federal program. Although EPA has granted Idaho authority to enforce its own hazardous waste program, EPA retains its authority under Section 3013(a) of the Act. IDEQ is not a party to this Order, but has requested that it be kept informed of the work to be conducted pursuant to this Order.

### **II. PARTIES BOUND**

5. The provisions of this Consent Order shall apply to and be binding upon Respondent and its officers, directors, employees, agents, contractors, successors, and assigns.
6. Each undersigned representative of the Parties to this Order certifies that he or she is fully authorized to enter into the terms and conditions of this Order.
7. No change in ownership, corporate status, or partnership status relating to the facility described in this Consent Order will in any way alter the status or responsibility of Respondent under this Consent Order. Any conveyance by Respondent of title, easement, or other interest in the facility described herein, or a portion of such interest, shall not affect Respondent's obligations under this Consent Order. Respondent shall be responsible and liable for any failure to carry out all activities required of Respondent by this Consent Order, irrespective of its use of employees, agents, contractors, or consultants to perform any such tasks.

8. Respondent shall provide a copy of this Consent Order to all contractors, subcontractors, laboratories, and consultants retained to conduct or monitor any portion of the work performed pursuant to this Consent Order within fourteen (14) calendar days of the effective date of this Consent Order, or on the date of such retention, and Respondent shall condition all such contracts on compliance with the terms of this Consent Order.

9. Any documents transferring ownership and/or operations of the facility described herein from Respondent to a successor-in-interest shall include written notice of this Consent Order. In addition, Respondent shall, no less than thirty (30) days prior to transfer of ownership or operation of the Facility, provide written notice of this Consent Order to its successor-in-interest, and written notice of said transfer of ownership and/or operation to EPA.

### **III. STATEMENT OF PURPOSE**

10. In entering into this Consent Order, the mutual objectives of EPA and Respondent are the protection of human health and the environment through Respondent's implementation of sampling, analysis, monitoring, and reporting at the facility that shall characterize the source(s) of contamination; characterize the potential pathways of contaminant migration; define the degree and extent of contamination; and identify actual or potential human and/or ecological receptors to fully determine the nature and extent of the presence and/or release of hazardous wastes at or from the facility.

### **IV. FINDINGS OF FACT**

11. Respondent's facility ("Facility") that is the subject of this Consent Order is located approximately five miles north of Soda Springs, Idaho on State Route 34, and includes all contiguous property currently under the ownership or control of Respondent.

12. The Facility has been in operation since at least the 1960's and occupies approximately 1,012 acres. The Facility produces, among other things, phosphoric acid and super phosphoric acid ("SPA") from phosphate ore for use in fertilizers and animal feed products.

13. The Facility produces mono ammonium phosphate ("MAP") and historically produced ammonium phosphate-sulfate ("APS") fertilizer. The Facility also produces sulfuric acid on site for the digestion of phosphate rock slurry to produce phosphoric acid. The sulfuric acid is also used in the production of fertilizer.

14. Additional operations at the Facility include phosphogypsum stack system(s), raw material storage and handling, and product handling and shipping.

15. Phosphoric acid is produced by digesting phosphate rock slurry with sulfuric acid. The reaction produces phosphogypsum crystals (calcium sulfate) and dilute phosphoric acid. The reaction mixture is filtered to separate phosphogypsum crystals from the dilute phosphoric acid. The dilute phosphoric acid separated from the reaction mixture is concentrated by evaporation. The phosphogypsum crystals separated from the reaction mixture are slurried with process water and pumped to phosphogypsum stacks ("gypstacks") for disposal.

16. In addition to process wastewater and phosphogypsum, other waste material, including tank cleanout waste and air pollution control scrubber wastewater, have been disposed of at the Facility's gypstacks

17. The Facility has five gypstacks, which are located west of the phosphoric acid manufacturing plant. They are designated as the No.1, No.2, and No.3 Gypstacks, the West Gypsum Stack, and the No.3 Tailings Pond.

18. The No.1 Gypstack received waste from the mid 1960's and the No.2 and No.3 Gypstacks received waste from the early 1970's. The No.3 Tailings Pond, which also received phosphogypsum, was placed into service in the early 1970's. The base of the No. 3 Tailings Pond was constructed of mine tailings in the late 1970's. The West Gypsum Stack was placed into service in December 2005, and is approximately 125 acres in size.

19. Decant water from the gypstacks has been directed to the "east" and "west" cooling ponds. Some air pollution control scrubber wastes and other wastewaters have also been discharged to the cooling ponds. The east and west cooling ponds were placed into service in 1996 and are each approximately 17 acres in size.

#### **EPA Inspection and Waste Release History:**

20. On October 5, 2005, and April 12, 2007, EPA conducted RCRA Compliance Evaluation Inspections of the Facility. EPA collected analytical samples for laboratory analysis as part of the 2005 Inspection. Wastewater samples were collected in and around the gypstacks and from several process areas.

21. EPA laboratory analyses for metals were performed using the Toxicity Characteristic Leaching Procedure (TCLP) (SW-846 Method 1311). Samples were also analyzed for fluoride and percent solids.

22. The gypstack decant water was sampled by EPA in October 2005. Laboratory analysis of the decant water yielded a pH of 1.0 Standard Units ("SU"), and a cadmium concentration of 6.08 mg/L and a chromium concentration of 12.4 mg/L using the TCLP.

23. SPA air pollution control scrubber effluent has also been discharged to the cooling ponds. A sample collected from the SPA scrubber drains on November 15, 2006, and analyzed by Respondent using the TCLP contained 9.63 mg/L cadmium and 20.5 mg/L chromium. Respondent also reported a pH of 1.7 SUs for the sample.

24. Granulation plant scrubber cleanouts have also been discharged to the cooling ponds. Respondent reported that samples taken on November 28, 2006, from the Granulation Scrubber Drain and analyzed by Respondent using the TCLP contained 6.31 mg/L cadmium and 22.7 mg/L chromium. A sample taken from the Dryer Scrubber Drain contained 2.19 mg/L cadmium and 5.18 mg/L chromium. The pH for the granulation and dryer scrubber drain samples was reported to be 2.3 SUs and 2.5 SUs, respectively.

25. Solids from granulation plant scrubbers have been discharged to the cooling ponds. Samples of the solids analyzed by Respondent contained 202 mg/L cadmium, 803 mg/L

chromium, 1,601 mg/L vanadium, and 3,197 mg/L zinc. An additional sample identified as "Scale from DAP Duct" has contained 336 mg/L cadmium, 1,316 mg/L chromium, 1,829 mg/L vanadium and 7,013 mg/L zinc.

26. The results of EPA analysis of samples taken from the cooling ponds in October 2005 indicated that cooling pond water had a pH of 1.0 SU, and contained 6.08 mg/L of cadmium and 12.4 mg/L of chromium using the TCLP.

27. Spills of pond water have occurred, including 112,500 gallons on May 24, 1997.

28. Sludge that accumulates in the Facility phosphoric acid tanks in the Oxidation Area Tank Farm and the Central Tank Farm has been periodically drained to tank farm sumps. From the tank farm sumps, the waste has been pumped to the Gypsum Tank and then discharged to the gypstacks. A sample collected from the Central Tank Farm Sump and analyzed by EPA for pH and metals in October 2005, contained 1.05 mg/L cadmium using the TCLP. The October 2005 Oxidation Area Tank Farm Sump sample contained 3.62 mg/L cadmium and 12.1 mg/L chromium using the TCLP. Both samples had a pH of 1.0 SU.

29. Liquid samples obtained from the gypsum disposal sump and gypsum stack discharge point by EPA in October 2005, yielded a pH of less than 2.0 SUs. The gypsum disposal sump sample contained 1.70 mg/L cadmium using the TCLP. The gypstack discharge point sample contained 3.12 mg/L cadmium using the TCLP.

30. A gypstack failure on December 27, 2006, discharged approximately 4 to 5 million gallons of material onto the Facility and onto an adjacent pasture beyond the Facility boundary.

31. The gypstack discharge point and the cooling pond return water were sampled on October 5, 2005 and found to contain 12,814 mg/L and 11,818 mg/L fluorides respectively.

32. Respondent has documented spills from phosphoric acid tanks that have drained to cooling ponds.

33. Respondent has documented spills from tanks that have drained to tank farm sumps that discharge to the gypsum tank and then to the gypstacks for disposal.

34. Phosphoric acid spills to the ground have occurred at the facility. Respondent also reported spills of sulfuric acid and a spill from a "reaction storage tank" to secondary containment and to soil.

35. The spilled liquids typically are characteristically corrosive with pHs of less than 2 SUs (hazardous waste code D002).

36. Spills of process wastewater have occurred including: a spill of 285,000 gallons on March 27, 2007 that contained 13% phosphoric acid; and a spill of 5,000 lbs. of process water on May 16, 1997.

37. At Respondent's Facility, certain process wastewaters exhibit the toxicity characteristic for cadmium (hazardous waste code D006) and for chromium (hazardous waste code D007) and thus are "hazardous wastes," as that term is defined in 40 C.F.R. § 261.3.

38. The spilled materials are discarded, and as such are "solid waste," as that term is defined in 40 C.F.R. § 261.2.

39. Cadmium is relatively mobile in aquatic environments, and is carcinogenic in animals exposed by inhalation; it may also be carcinogenic in humans. Cadmium is a known animal teratogen and reproductive toxin. It has chronic effects on the kidney, and causes tumors in rats. Other toxic effects attributed to cadmium include immunosuppression in animals, anemia in humans, pulmonary disease in humans, possible effects on the endocrine system, defects in sensory function, and bone damage.

40. Chromium is a known carcinogen and potentially may cause skin irritation or ulceration when people are exposed to it at levels above the Maximum Contaminant Level ("MCL") in drinking water (0.1 mg/L) for relatively short periods of time. Chromium has the potential to cause damage to liver, kidney, circulatory and nerve tissues from a lifetime exposure at levels above the MCL.

#### **Environmental Setting:**

41. In the Soda Springs area most groundwater is obtained from Pliocene and younger basaltic-rock aquifers. Flowing wells are common. The depth to water in non-flowing wells is about 265 feet. Well yields range from about 10 to about 3,400 gallons per minute, and the water from all aquifers is fresh water. Fresh groundwater withdrawals are used primarily for public-supply, domestic, commercial, agricultural (primarily irrigation and livestock watering), and industrial purposes. The principal aquifer consists primarily of unconsolidated-deposit aquifers (chiefly sand and gravel) that overlie volcanic- and sedimentary-rock aquifers (chiefly Pliocene and younger basaltic rocks).

42. Woodall Springs is located approximately one and a half miles to the north of the Facility property. The property owner adjacent to the west side of the Facility draws water from Woodall Spring for agricultural use. An open irrigation ditch used to transport water from Woodall Spring to the neighboring property runs adjacent to the gypsum stacks on Facility property between the new gypsum stack and Tailings Pond No.4.

43. Approximately ten (10) residents live within a 0.5-mile radius of the Facility.

#### **V. DETERMINATIONS AND CONCLUSIONS OF LAW**

44. The Facility is a "facility or site" within the meaning of Section 3013(a) of RCRA, 42 U.S.C. § 6934(a).

45. Respondent is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

46. Respondent is an "owner" and "operator" of the Facility within the meaning of Section 3013(a) of RCRA, 42 U.S.C. § 6934(a).

47. Section 1004(27) of RCRA, 42 U.S.C. § 6905(27), defines the term "solid waste" to mean "any garbage, refuse . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations . . ."

48. Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), defines the term "hazardous waste" to mean:

a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may-

a. cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

b. pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

49. Based on the foregoing Findings of Fact and Administrative Record, and pursuant to Section 3013(a) of RCRA, 42 U.S.C. § 6934(a), EPA has hereby determined that the Facility, owned and operated by Respondent, is a facility at which hazardous wastes, as that term is defined in 42 U.S.C. § 6903(5), have been treated, stored, or disposed of.

50. Based on the foregoing Findings of Fact and Administrative Record, and pursuant to Section 3013(a) of RCRA, 42 U.S.C. § 6934(a), EPA has hereby determined that there may be a substantial hazard to human health or the environment due to the presence and/or release of hazardous waste at or from the Facility.

51. EPA has further determined that Respondent, as owner and operator of the Facility, is the party responsible for conducting the actions ordered herein, which are necessary to ascertain the nature and extent of the hazard to human health or the environment.

## **VI. ORDER**

52. Pursuant to Section 3013(a) of RCRA, 42 U.S.C. § 6934(a), Respondent consents to and is hereby ordered to perform the following actions in the manner and by the dates specified herein.

53. The term "days" as set forth herein means calendar days unless otherwise specified.

54. The term "hazardous waste" as set forth herein means hazardous waste as defined at Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), and shall include hazardous constituents listed in Appendix VIII to 40 C.F.R. Part 261.

55. For purposes of this Order, "phosphogypsum stack system" is defined as the phosphogypsum stack (or pile, or landfill), together with all pumps, piping, ditches, drainage conveyances, water control structures, collection pools, cooling ponds, surge ponds, auxiliary holding ponds, regional holding ponds and any other collection or conveyance system associated with the transport of phosphogypsum from the plant to the phosphogypsum stack, its management at the stack, and the process wastewater return to the phosphoric acid production or other process. This definition specifically includes toe drain systems and ditches and other leachate collection systems, but does not include conveyances within the confines of the fertilizer production plant or emergency diversion impoundments used in emergency circumstances caused by rainfall events of high volume or duration for the temporary storage of process wastewater to avoid discharges to surface waters of the state.

56. This Order shall be carried out in a phased approach as set forth in the subsequent paragraphs of this section.

### **Expedited Data Collection**

57. Within fourteen (14) days of the effective date of this Consent Order, Respondent shall submit to EPA a consolidated package of existing Facility-specific information that contains, at a minimum, the information identified below. Information previously submitted to EPA need not be resubmitted provided Respondent identifies when and how the information was submitted to EPA and specifically identifies, by some unambiguous means, where the previously submitted information can be found in the information/documents submitted. Information that is not in the possession of Respondent may be submitted in accordance with a schedule and plan in the Sampling and Analysis Work Plan.

- a. All State and Federally issued environmental permits relevant to the subject matter of this Consent Order including, but not limited to: waste management permits; any permits for release or discharge of any material to the ground, groundwater, surface water, or to the air; any permits related to groundwater, including permits for groundwater wells and groundwater monitoring; water rights permits; and underground injection permits.
- b. Facility location information including:
  - (1) Geographical coordinates and site acreage;
  - (2) Property boundaries (e.g., "property is bounded by X farm on east");
- c. A detailed description of:
  - (1) History of ownership and each owner's production/manufacturing operations;
  - (2) The process water circulation system;

- (3) Each phosphogypsum stack's geographical coordinates, acreage, topographic data, operational history (e.g., construction date, engineering diagrams), subsurface settings, and perimeter dike construction;
- d. Any completed contaminant migration mitigation projects (e.g., installation of a slurry wall, lining under a portion of the facility, or groundwater extraction wells);
- e. Area and site-specific hydrology and hydrogeology;
- f. All available information related to existing functional on-site and off-site groundwater monitoring wells, including: (1) each well's surveyed surface reference point and vertical reference point elevation; (2) the boring and casing diameter and depth of each well; (3) specification of well intake design, including screen slot type, size and length, depth of screen, filter pack materials, and method of filter pack emplacement; (4) specification of the well casing and screen materials; 5) documentation of methods used to seal the well from the surface to prevent infiltration of water into the well and downward migration of contaminants through the well annulus; (6) description of well development methods and procedures; (7) documentation of all well design and installation parameters; and (8) documentation that all boring, well installation, and well abandonment procedures comply with all applicable federal, state, and local laws, and were conducted by a licensed driller.
- g. All available data related to environmental sampling (groundwater, soil, sediment, surface water) performed within three (3) years prior to the effective date of this Order.

58. Within thirty (30) days of the effective date of this Consent Order, Respondent shall submit to EPA all available information on history, location (by facility map), volume, flows, and mitigation response and procedures for spills/releases of hazardous waste outside the phosphogypsum stack system, including spills/releases originating from within phosphogypsum stack system. Information previously submitted to EPA need not be resubmitted provided Respondent identifies when and how the information was submitted to EPA and specifically identifies, by some unambiguous means, where the previously submitted information can be found in the information/documents submitted. Information that is not in the possession of Respondent may be submitted in accordance with a schedule and plan in the Sampling and Analysis Work Plan.

59. All data and data collection, unless specifically exempted by the EPA Project Coordinator, must comply with the Region 10 quality assurance requirements and policies found at: <http://yosemite.epa.gov/R10/OEA.NSF/webpage/OA+Reference+Documents>. Analytical methods must be those specified in the most recent version of Test Methods For Evaluating Solid Waste-Physical/Chemical Methods, U.S. EPA Publication No. SW-846, Methods for Chemical Analysis of Water and Wastes, EPA Report 600/4-79-020, March 1983, or alternate methods approved by EPA that will perform equal to or better than SW-846 methods under conditions expected in the investigation.

60. The information submitted by Respondent pursuant to Paragraphs 57 and 58 shall be used to help develop a plan for carrying out required monitoring, testing, and analysis as described below for the Sampling and Analysis Work Plan.

### **Sampling and Analysis Work Plan**

61. Within ninety (90) days of the effective date of this Consent Order, Respondent shall submit to EPA a Sampling and Analysis Work Plan ("Work Plan").

62. The Work Plan shall be designed to determine the nature and extent of any environmental contamination from hazardous waste. The Work Plan shall document the procedures Respondent shall use to assess sampling and analysis data Respondent or EPA has previously generated that relate to the purposes of this Consent Order as well as the procedures Respondent shall use to conduct those activities necessary to: characterize the source(s) of contamination; characterize the potential pathways of contaminant migration; define the degree and extent of contamination; and identify actual or potential human and/or ecological receptors. A specific schedule for expeditious implementation of all activities shall be included in the Work Plan. Respondent's Work Plan shall include the following:

a. A conceptual site model in accordance with applicable EPA guidance [http://www.epa.gov/osw/hazard/correctiveaction/pdfs/workshop/csm\\_ref.pdf](http://www.epa.gov/osw/hazard/correctiveaction/pdfs/workshop/csm_ref.pdf). The conceptual site model will be updated as new information is acquired as provided in the Work Plan and included in the Sampling and Analysis Report.

b. A sediment and soil sampling and analysis section to collect and analyze representative sediment and/or soil samples to determine the nature and extent of potential contamination at or from the Facility, both vertically and horizontally. Areas of sampling shall include areas of historical spills and historical contamination, railcar cleaning stations, stormwater ditches and retention ponds, non-phosphogypsum stack system water ditches and ponds, and any ditches associated with National Pollutant Discharge Elimination System ("NPDES") outfall(s). The Work Plan shall include the rationale for, and define the number, location, and depth of the samples, and the parameters for analysis.

c. A surface water (including run-off) sampling and analysis section to determine the nature and extent of any contaminated surface water and stormwater flowing from the portions of the facility adjacent to and down-gradient from facility operations (gypstacks, process areas, etc.). The Work Plan shall include the rationale for, and define the number, location, and depth of the samples, and the parameters for analysis.

d. A groundwater sampling and analysis section to characterize groundwater quality and the extent of any groundwater contamination at or from the Facility, both vertically and horizontally. The Work Plan shall include the rationale for, and define the number, location, and depth of the groundwater samples, and the parameters for analysis.

In addition, the groundwater sampling and analysis section shall identify all well specifications, and construction, and the procedures to be used in making the above well

placement determinations (e.g., well design, well construction, the use of Push Probe technology to aid in the placement of wells, iterative sampling concepts, geophysical investigative methods, groundwater modeling).

- (1) The groundwater monitoring network shall contain up-gradient wells capable of yielding samples representative of background water quality and that are not affected by releases of hazardous waste from the Facility. The number and location of the wells must be sufficient to characterize the spatial variability of background water quality.
- (2) The groundwater monitoring network shall contain downgradient wells capable of detecting any release of hazardous waste from the Facility to surface water or groundwater in each hydrogeologic unit. The number and location of these wells must be sufficient to characterize the nature and extent of any such releases, including any such releases which have migrated from the Facility or off-site.
- (3) The groundwater monitoring network shall be capable of operating for a period of time sufficient to provide representative groundwater samples during the investigation and for the evaluation and implementation of any corrective measures required at the Facility.
- (4) Any existing groundwater monitoring wells at the Facility included in the monitoring network that cannot meet the requirements of (1), (2), and (3) above, shall be decommissioned and replaced by new monitoring wells, unless otherwise required by applicable law or approved by EPA.
- (5) The groundwater sampling and analysis section shall include provisions to evaluate results of sampling and analysis throughout the investigation, and to modify, subject to EPA approval, the monitoring network (including well abandonment) and the Quality Assurance Project Plan as necessary, based on this evaluation, to meet the objectives of the investigation as set forth in the Project Management Plan.

e. A section for conducting a potable well survey within a ½ mile down-gradient of the Facility and for conducting sampling of each such potable well. The Work Plan shall include a schedule for the sampling and identify parameters to be analyzed for, including at a minimum the following analytes: arsenic, barium, cadmium, chromium, lead, selenium, antimony, beryllium, nickel, thallium, pH, sodium, sulfate, orthophosphate, calcium, magnesium, potassium, total dissolved solids, conductivity, fluoride, and gross alpha radiation (if gross alpha exceeds 15 pCi/L, analyze for Radium 226/228). All data and data collection, unless specifically exempted by the EPA Project Coordinator, must comply with the Region 10 quality assurance requirements and policies found at: <http://yosemite.epa.gov/R10/OEA.NSF/webpage/QA+Reference+Documents>

Analytical methods must be those specified in the most recent version of *Test Methods for Evaluating Solid Waste-Physical/Chemical Methods*, U.S. EPA Publication No. SW-846, Methods for Chemical Analysis of Water and Wastes, EPA Report 600/4-79-020, March 1983, or alternate methods approved by EPA that will perform equal to or better than SW-846 methods under conditions expected in the investigation

- f. Plans for extending sampling and analysis of potable wells by ½ mile radial increments in the appropriate direction depending on the results of the initial well survey, upon confirmation of an exceedance of Idaho drinking water standards for any contaminants that may have originated from the facility in any of the potable wells surveyed.
- g. A survey which identifies any wetlands, creeks, or lakes within a one (1) mile radius down-gradient and beyond the Facility's property boundary. This survey shall also identify any such bodies of water which are used for public recreational purposes or may contain endangered species.
- h. A Project Management Plan which sets forth the Facility-specific objectives for the Sampling and Analysis Work Plan and include detailed schedules and a description of the technical approach.
- i. A Data Management Plan for new sampling and analysis required by this Consent Order.
- j. A timeline for work detailed above and a schedule for the submission of progress reports, including a Sampling and Analysis Report.

63. Concurrent with the submission of the Sampling and Analysis Work Plan, Respondent shall submit for EPA's information, but not approval, a Health and Safety Plan (HASP) with respect to the work to be performed under this Consent Order.

64. Upon receipt of EPA approval of the Work Plan, Respondent shall implement the EPA-approved Work Plan in accordance with the terms and schedules contained therein. Upon completion of implementation of the Work Plan, Respondent shall submit to EPA for approval a Sampling and Analysis Report, in accordance with the requirements and schedule contained in the EPA-approved Sampling and Analysis Work Plan.

65. EPA acknowledges that Respondent has initiated some of the tasks required by this Consent Order and/or that Respondent may have available some of the information and data required by this Consent Order. This previous work may be used to meet the requirements of this Consent Order, upon submission to and approval by EPA.

## **VII. ADDITIONAL WORK**

66. Based on work performed under the Work Plan described above, EPA may determine that additional monitoring, testing, analysis, and/or reporting is necessary to ascertain the nature and extent of any hazard to human health and the environment which may be presented by the

presence or release of hazardous wastes at or from the Facility. If EPA determines that such additional work is necessary, EPA will notify Respondent in writing and specify the basis for its determination that additional work is necessary. Within fifteen (15) days after the receipt of such determination, Respondent shall have the opportunity to meet or confer with EPA to discuss the additional work. If required by EPA, Respondent shall submit for EPA approval a work plan for the additional work. EPA will specify the contents of such work plan. Such work plan shall be submitted by Respondent within thirty (30) days of receipt of EPA's determination that additional work is necessary, or according to an alternative extended schedule established by EPA.

#### **VIII. MINIMUM QUALIFICATIONS FOR PERSONNEL**

67. All work performed by the Respondent pursuant to this Consent Order shall be under the direction and supervision of an individual who has demonstrated expertise in hazardous waste site investigation. Before any work is performed, Respondent shall submit to EPA, in writing, the name, title, and qualifications of the supervisory personnel and of any contractors or subcontractors to be used in carrying out the terms of this Consent Order. Additionally, the Respondent shall ensure that when a license is required, only licensed individuals shall be used to perform any work required by this Consent Order.

#### **IX. SUBMISSIONS/EPA REVIEW**

68. EPA will review Respondent's work plans, draft and final reports, and any other documents submitted pursuant to this Consent Order ("submissions"), with the exception of progress reports and the HASP, and will notify Respondent in writing of EPA's approval or disapproval of each such submission. In the event of EPA's disapproval, EPA shall specify in writing any deficiencies in the submission. Such disapproval shall not be subject to the dispute resolution procedures of Section XVII., below.

69. Within thirty (30) calendar days of receipt of EPA's disapproval of the submission, Respondent shall submit to EPA for approval a revised submission which responds to any comments received and/or corrects any deficiencies identified by EPA. Respondent may request additional time within which to submit a revised submission. In the event that EPA disapproves the revised submission, Respondent may invoke the dispute resolution procedures of Section XVII., below. Otherwise, EPA reserves the right to revise such submission and seek to recover from Respondent the costs thereof, in accordance with any rights that it may have under RCRA, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and any other applicable law. Any submission approved or revised by EPA or upheld through dispute resolution under this Consent Order shall be deemed incorporated into and made an enforceable part of this Consent Order.

70. Upon disapproval by EPA of a revised submission, and in the event Respondent does not invoke the dispute resolution procedures of Section XVII., below, Respondent shall submit to EPA for approval a subsequent revised submission which responds to any comments received and/or corrects any deficiencies identified by EPA. Respondent may request additional time within which to submit a subsequent revised submission.

71. In the event EPA and Respondent cannot resolve issues relating to EPA's comments and EPA disapproves of any subsequent revised submission, Respondent may invoke the dispute resolution procedures of Section XVII., below. Otherwise, EPA reserves the right to revise such submission and to seek to recover from Respondent the costs of revising the subsequent submission in accordance with RCRA, CERCLA and any other applicable law. Any submission approved or revised by EPA or upheld through dispute resolution under this Consent Order shall be deemed incorporated into and made an enforceable part of this Consent Order.

72. Respondent shall provide EPA with quarterly progress reports demonstrating that all activities associated with this Consent Order are being carried out. The first such report shall be submitted within three months after the effective date of this Consent Order. These progress reports will summarize all activities to-date. This requirement shall continue throughout the period this Consent Order is effective. These quarterly progress reports shall be due on the fifteenth day of the month following the end of the quarter.

73. EPA shall endeavor to timely approve or disapprove any deliverable submitted by Respondent for approval pursuant to this Consent Order. Nothing in this paragraph shall be construed to confer any enforceable rights upon Respondent, nor shall any failure to comply with the provisions of this paragraph be subject to the dispute resolution provisions set forth in Section XVII., below.

74. Unless otherwise specified, reports, correspondence, approvals, disapprovals, notices, or other submissions relating to or required under this Consent Order shall be in writing and shall be sent as follows:

- a. Unless otherwise approved by EPA, two (2) copies (one hard copy, double-sided if possible, and one electronic copy) of all documents to be submitted to EPA shall be hand-delivered or sent by overnight mail to:

Sylvia Burges  
U.S. Environmental Protection Agency  
Office of Compliance and Enforcement, M/S OCE-127  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101  
Email: [burges.sylvia@epa.gov](mailto:burges.sylvia@epa.gov)

- b. One (1) copy of all documents submitted to EPA shall also be sent to:

Brian Monson  
Idaho Department of Environmental Quality  
1410 N. Hilton  
Boise, Idaho  
Email: [Brian.Monson@deq.idaho.gov](mailto:Brian.Monson@deq.idaho.gov)

- c. Documents to be submitted to Respondent shall be sent to:

James Cagle  
Risk Manager – EHS  
CPO-AGRIUM  
310 Conda Road  
Soda Springs, Idaho 83276  
Email: jcagle@agrium.com

With a copy to:

P. Scott Burton, Esq.  
Hunton and Williams LLP  
550 S. Hope Street, Suite 2000  
Los Angeles, CA 90071-2627  
Email: sburton@hunton.com

75. Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Consent Order which discusses, describes, demonstrates, supports any finding or makes any representation concerning Respondent's compliance or noncompliance with any requirement of this Consent Order shall be certified by a duly authorized representative of Respondent. A person is a "duly authorized representative" only if: (a) the authorization is made in writing; (b) the authorization specifies either an individual or position having responsibility for overall operation of the regulated facility or activity (a duly authorized representative may thus be either a named individual or any individual occupying a named position); and (c) the written authorization is submitted to the Project Coordinator designated by EPA pursuant to Section XI, Project Coordinator, of this Consent Order.

76. The certification required by paragraph 75 above, shall be in the following form:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to be the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Signature :

Name:

Title:

## **X. QUALITY ASSURANCE/QUALITY CONTROL**

77. Prior to or with the submission of the Sampling and Analysis Work Plan, Respondent shall submit a Quality Assurance Project Plan ("QAPP") supporting all data investigations required by this Order that satisfies the following requirements:

a. All data and data collection, unless specifically exempted by the EPA Project Coordinator, must comply with the Region 10 quality assurance requirements and policies as found at:

<http://yosemite.epa.gov/R10/OEA.NSF/webpage/OA+Reference+Documents>

b. Analytical methods must be those specified in the most recent version of *Test Methods for Evaluating Solid Waste-Physical/Chemical Methods*, U.S. EPA Publication No. SW-846, Methods for Chemical Analysis of Water and Wastes, EPA Report 600/4-79-020, March 1983, or alternate methods approved by EPA that will perform equal to or better than SW-846 methods under conditions expected in the investigation.

78. The Sampling and Analysis Work Plan shall reference the QAPP developed as per the requirements set forth on the EPA quality assurance website cited above. Requirements for a QAPP include those found in: EPA QA/R-5 - EPA Requirements for Quality Assurance Project Plans, EPA/240/B-01/003 March 2001, or the most recent update of this document. Revisions to the QAPP shall be approved by EPA, tracked and recorded on a revisions page within the document.

79. The contact person(s), name(s), addresses, and telephone numbers of the analytical laboratories Respondent proposes to use must be specified in the applicable work plan(s).

80. All work plans required under this Consent Order shall include data quality objectives for each data collection activity to ensure that data of known and appropriate quality are obtained and that data are sufficient to support their intended use(s).

81. Respondent shall monitor to ensure that high quality data is obtained by its consultant or contract laboratories. Respondent shall ensure that laboratories used by Respondent for analysis perform such analysis according to the latest approved edition of *Test Methods for Evaluating Solid Waste-Physical/Chemical Methods*, U.S. EPA Publication No. SW-846, or other methods deemed satisfactory to EPA. If methods other than EPA methods are to be used, Respondent shall specify and submit all such protocols for EPA approval in the work plan. EPA may reject any data that does not meet the requirements of the approved work plan or EPA analytical methods and may require re-sampling and additional analysis.

82. Respondent shall ensure that laboratories it uses for analyses participate in a Quality Assurance/Quality Control ("QA/QC") program equivalent to that which is followed by EPA. EPA may conduct a performance and QA/QC audit of any laboratory chosen by Respondent before, during, or after sample analyses. Upon request by EPA, Respondent shall have its laboratory perform analyses of samples provided by EPA to demonstrate laboratory performance. If the audit reveals deficiencies in a laboratory's performance or QA/QC, EPA may require re-sampling and additional analysis.

## **XI. PROJECT COORDINATOR**

83. EPA hereby designates as its Project Coordinator:

Sylvia Burges  
U.S. Environmental Protection Agency  
Office of Compliance and Enforcement, M/S OCE-127  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101  
Email: [burges.sylvia@epa.gov](mailto:burges.sylvia@epa.gov)  
Phone: 206-553-1254

84. Respondent hereby designates as its Project Coordinator:

James Cagle  
Risk Manager – EHS  
CPO-AGRIUM  
310 Conda Road  
Soda Springs, Idaho 83276  
Email: [jcagle@agrium.com](mailto:jcagle@agrium.com)  
Phone: (208) 547-4381, ext. 213

85. Each Project Coordinator shall, on behalf of the party that designated him/her, oversee the implementation of this Consent Order and function as the principal project contact.

86. All communication between Respondent and EPA, and all documents, reports, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Consent Order shall be directed through or include the Project Coordinator.

87. Respondent shall provide EPA and EPA shall provide Respondent with a written notice of any change in its Project Coordinator. Such notice shall be provided at least ten (10) calendar days prior to the change in Project Coordinator.

88. The absence of the EPA Project Coordinator shall not be cause for the stoppage or delay of work.

## **XII. SAMPLING AND DATA/DOCUMENT AVAILABILITY**

89. Respondent shall submit to EPA the results of all sampling and/or tests or other data generated by, or on behalf of, Respondent pursuant to the requirements of this Consent Order.

90. Unless otherwise agreed to by EPA, Respondent shall notify EPA and IDEQ, in writing and by electronic mail, at least ten (10) days in advance of engaging in any field activities at the Facility conducted pursuant to this Consent Order.

91. At the request of EPA or IDEQ, Respondent shall provide or allow EPA and IDEQ or their authorized representatives to take split and/or duplicate samples of all samples collected by Respondent pursuant to this Consent Order. Similarly, at the request of Respondent, EPA will

allow Respondent or its authorized representatives to take split and/or duplicate samples of any samples collected by EPA under this Consent Order, provided that such sampling shall not delay EPA's proposed sampling activities. Respondent shall submit to EPA the results of all sampling and/or tests or other data generated by, or on behalf of, the Respondent pursuant to this Order.

92. Nothing in this Consent Order shall limit or otherwise affect EPA's authority to collect samples pursuant to any applicable law, including, but not limited to, RCRA and/or CERCLA.

93. EPA will make available to the Respondent the results of sampling and/or tests or other data from the Facility generated by, or on behalf of, EPA.

### **XIII. ON-SITE AND OFF-SITE ACCESS**

94. Respondent shall provide access at all reasonable times to the Facility and to all records and documentation relating to conditions at the Facility and the activities conducted pursuant to this Consent Order to EPA and IDEQ and their employees, contractors, agents, consultants, and representatives. These individuals shall be permitted to move freely at the Facility in order to conduct activities relating to conditions at the Facility and the activities conducted pursuant to this Consent Order which EPA or IDEQ determine to be necessary, provided Respondent has a reasonable opportunity to accompany such individuals.

95. To the extent that activities required by this Consent Order, or by any approved work plans prepared pursuant hereto, must be done on property not owned or controlled by Respondent, Respondent will use its best efforts to obtain site access agreements in a timely manner from the present owners of such property. Best efforts, as used in this paragraph, shall include the payment of reasonable compensation in consideration of granting access. Respondent shall ensure that EPA's Project Coordinator has a copy of any access agreements.

96. Nothing in this Consent Order limits or otherwise affects EPA's right of access and entry pursuant to applicable law, including but not limited to RCRA and CERCLA.

### **XIV. RECORD PRESERVATION**

97. Respondent shall retain, during the pendency of this Consent Order and for a minimum of five (5) years after its termination, a copy of all data, records, and documents now in its possession or control, or in the possession or control of its contractors, subcontractors, representatives, or which come into the possession or control of the Respondent, its contractors, subcontractors, or representatives, which relate in any way to this Consent Order. Respondent shall notify EPA, in writing, at least ninety (90) days in advance of the destruction of any such records, and shall provide EPA with the opportunity to take possession of any such records. Such written notification shall reference the caption, docket number, and date of issuance of this Consent Order and shall be addressed to:

Director, Office of Compliance and Enforcement (M/S OCE-164)  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

98. Additionally, Respondent shall provide data, records, and documents retained under this Section at any time before the expiration of the five (5) year period at the written request of EPA.

#### **XV. INFORMATION SUBMITTED TO EPA**

99. Respondent may assert a business confidentiality claim in the manner described in 40 C.F.R. § 2.203(b) covering all or part of any information submitted to EPA pursuant to this Consent Order. In accordance with 40 C.F.R. § 2.204(e)(4), any assertion of confidentiality shall be adequately substantiated by Respondent when the assertion is made. Information submitted for which Respondent has asserted a claim of confidentiality as specified above shall be disclosed by EPA only to the extent and manner permitted by 40 C.F.R. Part 2, Subpart B. If no such confidentiality claim accompanies the information when it is submitted to EPA, the information may be made available to the public by EPA without further notice to Respondent. Respondent agrees not to assert any confidentiality claim with respect to any physical, sampling, monitoring, or analytical data.

100. In the event that Respondent wishes to assert a privilege with regard to any document which EPA seeks to inspect or copy pursuant to this Consent Order, Respondent shall identify the document, the privilege claimed, and the basis therefore in writing. For the purposes of this Consent Order, privileged documents are those documents exempt from discovery from the United States in litigation under the Federal Rules of Civil Procedure and/or any applicable case law. EPA may dispute any such claim of privilege pursuant to the dispute resolution provisions set forth in Section XVII., below.

#### **XVI. DELAY IN PERFORMANCE/STIPULATED PENALTIES**

101. Unless there has been a written modification of a compliance date by EPA, or excusable delay as defined below in Section XVIII, Force Majeure, in the event that Respondent fails to comply with any requirement set forth in this Consent Order, Respondent shall pay stipulated penalties, as set forth below, upon receipt of a written demand by EPA.

102. Compliance by Respondent shall include commencement or completion, as deemed appropriate by EPA, of any activity, plan, study, or report required by this Consent Order, and in the manner required by this Consent Order and within the specified time schedules in and approved under this Consent Order. Stipulated penalties shall accrue as follows:

Period of Failure to Comply	Penalty Per Violation Per Day
1st day through 15th day	\$500
16th day through 30 <sup>th</sup>	\$1000
31st day and each day after that	\$1500

103. All stipulated penalties shall begin to accrue the first day that a violation occurs, or the first day after the date that complete performance is due, and shall continue to accrue through the final day of or correction of the violation. Nothing herein shall prevent the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Order.

104. All stipulated penalties owed to EPA under this section shall be due within thirty (30) calendar days of receipt of a demand for payment, unless Respondent invokes the dispute resolution procedures under Section XVII., below. Such demand for payment shall describe the noncompliance and shall indicate the amount of stipulated penalties due.

105. All stipulated penalty payments shall be made by certified check, cashier's check, or wire transfer. Checks shall be payable to the Treasurer of the United States of America and shall be remitted to:

United States Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

Wire transfer payments shall be made to the following:

Federal Reserve Bank of New York  
ABA: 021030004  
Account Number: 68010727  
SWIFT address: FRNYUS33  
33 Liberty Street  
New York NY 10045  
Field Tag 4200 of the Fedwire message should read:  
"D 68010727 Environmental Protection Agency"

106. All payments shall reference the Respondent's name and address, and the EPA Docket Number of this Consent Order. Copies of the transmittal of payment shall be sent simultaneously to the EPA Project Coordinator at the address in paragraph 83 and to the EPA Regional Hearing Clerk, U.S. EPA Region 10, ORC-158, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101-3140.

107. Respondent may dispute EPA's demand for payment of stipulated penalties for any alleged violation of this Consent Order by invoking the dispute resolution procedures below under Section XVII., Dispute Resolution. Stipulated penalties shall continue to accrue, but are not required to be paid, for any alleged noncompliance which is the subject of dispute resolution during the period of such dispute resolution. To the extent that Respondent does not prevail upon resolution of the dispute, Respondent shall remit to EPA within twenty-one (21) calendar days of receipt of EPA's written decision as to said dispute, any outstanding penalty payment in the manner described above in Paragraphs 105 and 106 of this Section.

108. Neither the filing of an objection to resolve a dispute nor the payment of stipulated penalties shall alter in any way Respondent's obligation to comply with the requirements of this Consent Order.

109. The assessment of stipulated penalties set forth in this section shall not preclude EPA from pursuing any other remedies or sanctions which may be available to EPA by reason of Respondent's failure to comply with any of the requirements of this Consent Order.

110. EPA in its sole discretion may reduce or waive stipulated penalties.

## **XVII. DISPUTE RESOLUTION**

111. If a dispute arises under this Consent Order, the procedures of this section shall apply. The Parties shall make reasonable efforts to informally resolve disputes at the Project Coordinator or immediate supervisor level.

112. If Respondent disagrees, in whole or in part, with any EPA disapproval, modification, or other decision or directive made by EPA pursuant to this Consent Order, Respondent shall notify EPA in writing of its objections, and the basis therefore, within fourteen (14) calendar days of receipt of EPA's disapproval, decision, or directive. Such notice shall set forth the specific points of the dispute, the position which Respondent asserts should be adopted as consistent with the requirements of this Consent Order, the basis for Respondent's position, and any matters which it considers necessary for EPA's determination. EPA and Respondent shall have an additional fourteen (14) calendar days from the receipt by EPA of the notification of objection, during which time representatives of EPA and Respondent may confer in person or by telephone to resolve any disagreement. If an agreement is reached, the resolution shall be written and signed by an authorized representative of each party. In the event that resolution is not reached within this fourteen (14) calendar day period, EPA will furnish to Respondent, in writing, its decision on the pending dispute. Said written decision shall state the basis and rationale for the decision. EPA's decision shall be incorporated into and become an enforceable part of this Order.

113. Except as provided in Paragraphs 111 and 112 above, the existence of a dispute, as defined in this section, and EPA's consideration of matters placed into dispute, shall not excuse, toll or suspend any other compliance obligation or deadline required pursuant to this Consent Order during the pendency of the dispute resolution process.

114. Notwithstanding any other provisions of this Consent Order, no action or decision by EPA pursuant to this Consent Order shall constitute final agency action giving rise to any right to judicial review.

## **XVIII. FORCE MAJEURE**

115. Respondent shall perform the requirements of this Consent Order in the manner and within the time limits set forth herein, unless the performance is prevented or delayed by events which constitute a *force majeure*. Respondent shall have the burden of proving such a *force majeure*. A *force majeure* is defined as any event arising from causes not reasonably foreseeable and beyond the control of Respondent, which cannot be overcome by due diligence and which delays or prevents performance in the manner or by a date required by this Consent Order. A *force majeure* does not include: increased costs of performance; changed economic circumstances; failure to obtain federal, State, or local permits if, and only if, the Respondent has

not submitted a timely and complete application for said permit(s); reasonably foreseeable weather conditions; or weather conditions which could have been overcome by due diligence.

116. Respondent shall notify EPA, in writing, within ten (10) calendar days after it becomes or should have become aware of any event which Respondent claims constitutes a *force majeure*. Such notice shall estimate the anticipated length of delay, including necessary demobilization and remobilization, its cause, measures taken or to be taken to prevent or minimize the delay, and an estimated timetable for implementation of these measures. Failure to comply with the notice provision of this paragraph shall constitute a waiver of Respondent's right to assert a *force majeure* claim with respect to such event. If, in EPA's sole and unreviewable discretion, EPA determines that the failure to give notice was not prejudicial to EPA, Respondent's failure to give notice shall not constitute a waiver. In addition to the above notification requirements, Respondent shall undertake all reasonable actions to prevent or to minimize any delay in achieving compliance with any requirement of this Consent Order after it becomes or should have become aware of any event which may delay such compliance.

117. If EPA determines that the failure to comply or delay has been or will be caused by a *force majeure*, the time for performance of that requirement of this Consent Order may be extended, upon EPA approval, for a period equal to the delay resulting from such *force majeure*. This shall be accomplished through a modification or amendment to this Consent Order pursuant to Section XXII., Subsequent Modification of Order. Such an extension shall not alter the schedule for performance or completion of any other tasks required by this Consent Order, unless these tasks are unavoidably affected by the delay. In the event that EPA and Respondent cannot agree that any delay or failure has been or will be caused by a *force majeure*, or if there is no agreement on the length of the extension, Respondent may invoke the dispute resolution procedures set forth above in Section XVII., Dispute Resolution.

## **XIX. RESERVATION OF RIGHTS**

118. EPA expressly reserves all rights and defenses that it may have, including the right to disapprove of work performed by Respondent pursuant to this Consent Order, to require that Respondent correct and/or re-perform any work disapproved by EPA, and to request that Respondent perform tasks in addition to those stated in the Scope(s) of Work, work plans, or in this Consent Order, consistent with the objectives of this Consent Order.

119. EPA hereby reserves all of its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, including any which may pertain to Respondent's failure to comply with any of the requirements of this Consent Order. This Consent Order shall not be construed as a covenant not to sue, or as a release, waiver, or limitation of any rights, remedies, defenses, powers, and/or authorities, civil or criminal, which EPA has under RCRA, CERCLA, the Clean Water Act ("CWA"), the Safe Drinking Water Act ("SDWA"), the Clean Air Act ("CAA"), or any other statutory, regulatory, or common law enforcement authority of the United States.

120. EPA reserves the right to perform any portion of the work required herein or any additional monitoring, sampling, analysis, or reporting it deems necessary to protect public health or welfare or the environment. EPA reserves the right to seek reimbursement from

Respondent for costs incurred by EPA in connection with any such actions, pursuant to any right it may have under applicable law.

121. EPA reserves whatever rights it may have under any environmental law or authority, or in equity, to seek to recover from Respondent any costs incurred by EPA in overseeing the implementation of this Consent Order.

## **XX. OTHER APPLICABLE LAWS**

122. All actions required to be taken pursuant to this Consent Order shall be undertaken in accordance with the requirements of all applicable federal, state, and local laws, regulations, permits, and ordinances.

123. Compliance by Respondent with the terms of this Consent Order shall not relieve Respondent of its obligations to comply with RCRA, or any other applicable federal, state, or local laws, regulations, permits, and ordinances.

124. This Consent Order is not and shall not be interpreted to be a permit, or as a ruling or a determination of any issue related to a permit under federal, state, or local law. This Consent Order shall not in any way affect Respondent's obligation, if any, to secure such a permit, nor shall this Consent Order be interpreted in any way to affect or waive any of the conditions or requirements that may be imposed by such permit, nor of Respondent's right to appeal any conditions of such permit. Respondent shall timely obtain or cause its representatives to timely obtain all permits and approvals necessary under such laws and regulations. The time for Respondent's performance under this Consent Order may be extended upon written approval by EPA while Respondent uses its best efforts to obtain state and local permits required for any activities required by the Work Plan.

## **XXI. OTHER CLAIMS**

125. Nothing in this Consent Order shall constitute or be construed as a release from any claim, cause of action, demand, or defense in law or equity, against any person, firm, partnership, or corporation for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous wastes, hazardous constituents, hazardous substances, pollutants, or contaminants found at, taken to, or migrating from the Facility.

126. Neither the United States nor EPA shall be deemed a party to any contract involving Respondent and relating to activities at the Facility, and shall not be liable for any claim or cause of action arising from or on account of any act or omission of Respondent, or its officers, employees, contractors, receivers, trustees, agents, or assigns, in carrying out the activities required by this Consent Order.

## **XXII. SUBSEQUENT MODIFICATION OF ORDER**

127. Except as provided in Paragraph 129 of this section, the provisions of this Consent Order may be amended only by mutual agreement of EPA and Respondent. Any such amendment shall be in writing, shall be signed by an authorized representative of each party, shall have as its

effective date the date on which it is signed by EPA, and shall be incorporated into this Consent Order. Any oral agreement between EPA and Respondent, the purpose of which is to modify this Consent Order to address exigent circumstances, and which is subsequently ratified in writing by EPA and Respondent, shall have as its effective date the date of such oral agreement.

128. Any reports, plans, specifications, schedules, and other submissions and attachments required by this Consent Order are, upon written approval by EPA, incorporated into this Consent Order. Any noncompliance with such EPA-approved reports, plans, specifications, schedules, other submissions, and attachments shall be considered a violation of this Consent Order and shall subject Respondent to enforcement, including the stipulated penalty provisions above in Section XVI., Delay in Performance/Stipulated Penalties.

129. Modifications in the studies, techniques, procedures, designs, work plans, or schedules utilized in carrying out this Consent Order and necessary for the completion of the project may be made by written agreement of the Project Coordinators. Such modifications shall have as an effective date the date on which the agreement is signed by the EPA Project Coordinator.

130. No informal advice, guidance, suggestions, or comments by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall be construed as relieving Respondent of its obligation to obtain written approval, if and when required by this Consent Order.

### **XXIII. SEVERABILITY**

131. If any provision or authority of this Consent Order, or the application of this Consent Order to any party or circumstances, is held by any judicial or administrative authority to be invalid, the application of such provisions to other parties or circumstances and the remainder of the Consent Order shall not be affected thereby and shall remain in full force.

### **XXIV. TERMINATION AND SATISFACTION**

132. The provisions of this Consent Order shall be deemed satisfied upon Respondent's receipt of written notice from EPA that Respondent has demonstrated to the satisfaction of EPA that the terms of the Consent Order, including any additional tasks determined by EPA to be required pursuant to this Consent Order, have been satisfactorily completed. Such notice shall not be unreasonably withheld. This notice shall not, however, terminate Respondent's obligations to comply with any continuing obligations hereunder, including, but not limited to: Section XIV., Record Preservation; Section XIX, Reservation of Rights; Section XX., Other Applicable Laws; and Section XXI., Other Claims.

### **XXV. ATTORNEYS' FEES AND COSTS**

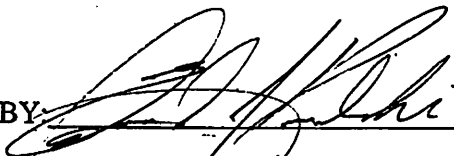
133. Respondent shall bear its own costs and attorneys' fees.

### **XXVI. EFFECTIVE DATE**

134. The effective date of this Consent Order shall be the date on which Respondent receives a true and correct copy of the fully executed Consent Order.

IT IS SO AGREED AND ORDERED:

DATE: 6/23/09

BY: 

Edward J. Kowalski, Director  
Office of Compliance and Enforcement  
Region 10

FOR EPA

DATE: 6.12.09

BY: 

Name: Zink Veltreger  
Title: Plant Manager CPO  
Address: 3040 Canby Rd  
Soda Springs ID 83276

FOR RESPONDENT